Office-Supreme Court, U.S.
FILED
NOV 29 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STANFORD BARRÉ AND JOSEPH WOMBLE,
Petitioners,

v.

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH D. DWYER, JR.
Attorney for Respondent
503 Whitney Bank Building
New Orleans, Louisiana 70130
(504) 524-2227

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

Page

ARGUMENT ON FIRST REASON TO ALLOW WRIT 1

ARGUMENT ON SECOND REASON TO ALLOW WRIT 7

CONCLUSION 12

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

CASES:

Alvary v. *United States*, 302 F.2d 790 (2nd Cir. 1962) . 4

U.S. Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) 7, 8, 10, 11, 12, 13

First National Bank of Boston v. *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) 7, 9, 10, 11, 12, 13

Citizens Against Rent Control v. *Berkeley*, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) ... 7, 10, 11, 12, 13

Broadrick v. *Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) 8, 11, 13

Morial v. *Judiciary Commission of State of Louisiana*, 565 F.2d 295 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978) 8

Wachsman v. *Dallas*, 704 F.2d 60 (5th Cir. 1983) .. 10, 11, 13, 15

Bruno v. *Garsaud*, 594 F.2d 1062 (5th Cir. 1979) 14

Mortillaro v. *State of Louisiana*, 356 F.Supp. 521 (1972) 14

STATUTES:

Federal Rules of Evidence, Section 201 ..... 2, 3, 5, 6

Federal Rules of Civil Procedure, Rule 12(b)(c) and Rule 56 3

CONSTITUTIONAL PROVISIONS:

Article 10, Section 9(c) of Constitution of Louisiana. 8, 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-387

STANFORD BARRÉ AND JOSEPH WOMBLE,
Petitioners,

v.

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S ARGUMENT IN OPPOSITION TO STATED REASONS FOR ALLOWANCE OF THE WRIT

I.

Re: Federal Rule of Evidence 201

The petitioners posit the proposition that certain facts erroneously were judicially noticed by the Dis-

trict Court, but did not at any time "challenge the notice nor assert[ed] that the noticed facts were not properly noticed facts." Appendix "C" Page A-11. In fact, the plaintiffs never requested such "an opportunity to challenge the notice." District Court's Opinion. Appendix "C" Page A-11 Petitioner's Brief. (Hereinafter all references to the Appendix refer to the one attached to the Petitioner's brief to this Court.) The petitioners have failed to point out what, if any, error the District Court made in taking notice of facts which were and still remain indisputable. The facts were actually discernable on the face of the papers and were admitted to in open Court by counsel. "Adjudicative facts are simply the facts of the particular case." Federal Rules of Evidence, Rule 201, 28 U.S.C.A., note to Subdivision (a).

The original complaint and the documents attached to it presented several of the salient facts that were needed by the District Court to dismiss the action.[1] It is submitted that Rule 201(b) not only governs here but its employment was not abused by the Court. Section (b) of the rule states that "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known in the terri-

---

[1] It was common knowledge in New Orleans at the time of the hearing that a petition was being circulated to obtain the requisite number of signatures to present to the City Council the proposition to amend the City's charter to eliminate the two-term limitation on the office of Mayor of the City. It was a fact that Mayor Morial was in his second term. The Mayor's executive council, Michael Bagneris, was spearheading the effort. The bumper stickers and petition were placed in evidence. These are examples of the facts of which the Trial Judge correctly took judicial notice pursuant to Rule 201(b).

torial jurisdiction of the Court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Could a finding by the court that the incumbent mayor could and would be the only person who could benefit from the proposed Charter change be a fact unknown at the time of the hearing to petitioners? Did they require notice of this fact? Under Rule 201(c) "a Court may take such judicial notice whether requested or not." The Court stated that it could not exist in a vacuum, in effect taking judicial notice of the fact that Mayor Morial was the only one who could benefit from the change. Certainly this is exactly the kind of adjudicated fact addressed by Rule 201 and negates any necessity to "notice" the movers when the court chose to convert the Federal Rules of Civil Procedure 12(b)(6) motion to a Rule 56 motion.

> "Although plaintiffs are correct in noting that Federal Rule of Evidence 201(d) (sic) provides for notice when a Court takes judicial notice of a fact on its own initiative, the rule only provides for notice and an opportunity to be heard on the propriety of the notice upon request, which request can be made after the notice was taken. *Plaintiffs have neither requested an opportunity to challenge the notice nor asserted that the noticed facts were not properly noticed facts.*" Appendix "C", Page A-10 (Emphasis added).

Further, the plaintiffs admitted in open Court through counsel that the "New Orleans Loves Dutch" and "Dutch Loves New Orleans" bumper stickers and the petition (N.B. the classified employees were *permitted* to sign the petition. Appendix "N" P. A-29.) were inextricably bound together. Appendix "A", P-4

and see Appendix "C", Page A-11 where the Court stated:

> "The Court also accepted at face value the declaration by counsel for plaintiffs that the bumper sticker and the petition are tied together, and considered them accordingly. An examination of the pleadings and *attachments* clearly discloses additional relevant facts:
>
> —under the existing City Charter, an incumbent mayor, elected to two full consecutive terms may not succeed himself.
>
> —the petitions seek to initiate a referendum procedure to delete the prohibition against a two-term mayor succeeding himself.
>
> —plaintiffs have affixed in the past and wish to continue to affix to City vehicles in the future the two subject bumper stickers which refer to the incumbent Mayor Ernest N. 'Dutch' Morial." (Emphasis added.)

Petitioners complain in their first "Reason For granting Writ" that the notice taken by the District Court was improper citing *Alvary* v. *United States*, 302 F.2d 790 (2d Cir. 1962) in support. This case does not support petitioners' contention.

Mr. Alvary, a naturalized citizen, claimed a deduction on his federal income taxes for a net operating loss carry forward (and back) for property situated in Budapest, Hungary, which had been confiscated by the communist regime. There was expert testimony presented by both sides on the market value of the gifts (the property in question) to the taxpayer, and none to the effect that the properties were valueless. Yet the trial judge, "giving credence to materials in the New York Public Library not cited by the parties"

held: "that there was no market value of the two properties in question".

The appellate court on review had this to say without direct reference to Rule 201:

> "Although it is proper, and all too frequently necessary for a judge to do independent research on questions of law, the value of these two pieces of real property and the status of Hungarian free-trade in 1947-48 are questions of fact. On fact questions the court should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or are capable of verification". Citing cases. (Emphasis added.)

How does this citation to this court support petitioner? It doesn't. It supports the District Judge in every regard.

In view of the foregoing it seems almost incredulous for the petitioners to state now (in brief page 7) that "[T]he judicially noticed facts are subject to reasonable dispute because they did not meet the requirements of Federal Rule of Evidence 201(b)" How? In what manner? Every fact was either in evidence, e.g., the bumper stickers and the circulated petition, judicially admitted in open court, or otherwise so patently obvious that the District Court would have indeed been living in a vacuum not to discern the true intent of the petition and the bumper stickers on City owned vehicles. Mayor Morial was the only one who possibly could gain from the campaign to effect a charter change. He is in his second year of a two-year term. Isn't that pretty much of an adjudicative fact as contemplated by 201(b)? [Note: To this very day he or his adherents are still seeking a charter change to

allow him to succeed himself in office; e.g., a sign reading "Only One More Dutch Please" has been placed on Rural Transit Authority buses and another 10,000 signatures are being sought to petition for another City *Charter* Amendment (*not* a state Constitutional amendment) to permit this.] Is the District Judge to be proscribed to the extent that he cannot take cognizance of some of the activity that is in the local newspaper almost on a daily basis, or to be heard on radio, and seen on TV in various news broadcasts? This was an activity so overwhelmingly smacking of politics in a city and state saturated with that "art" that to describe it differently would amount to engaging in a flagrant exercise of dissembling or rather to have Justice truly blinding itself to the obvious. This was a "partisan" election in the truest sense of the term. The air was then and still highly charged with politics in the City. The District Judge was correct when he wrote that "[F]irst of all, not living in a vacuum"; he had the "authority under the Federal Rules of Civil Procedure, Rule 201, to take notice of certain adjudicative facts." Appendix "A" Page A-4.

There was not nor could there ever be anything "disputed" about the facts. The rule speaks of a "reasonable dispute". How could there be one in view of the foregoing? All of the facts certainly meet the two-pronged test of 201(b) in that, first, they were certainly "generally known within the territorial jurisdiction of the trial court." Anyone living within at least a 75 mile range of the City of New Orleans, who read the newspaper, listened to the radio or watched television would have been as aware of the facts as the trial judge was. Certainly the facts were "capable of accurate and ready determination by resort to sources

whose accuracy cannot be reasonably questioned." As stated above the two bumper stickers were attached to the original complaint and petitioners' counsel admitted in open court that they were "part and parcel of the same effort." See Appendix "A", Page A-4.

There was no conjecture here, only pure knowledge of readily discernible facts. What can be more true than this judicial admission made by petitioners' counsel in open court? The entire campaign to change the Charter, still going on, was a pure, partisan political effort and everyone in the City of New Orleans and environs well knew it including the District Judge.

II.

We will now turn to the second assigned reason for allowance of the writ. The petitioners argue that "[T]he opinion (sic) of the Court of Appeal affirming the ruling of the District Court that participation in a non-candidate election is not a Constitutional deprivation of civil rights is contrary to this court's holding in *Letter Carriers, Belotti* (sic) and *Citizens Against Rent Control, supra,* and requires resolution by this Court" Brief, Page 9. One must hasten to rejoin that the United States Court of Appeals, Fifth Circuit, issued a *Per Curiam* affirming the District Court three days after it was argued. Appendix "D". The District Court rendered two Opinions, the original one and another one on rehearing. Appendices "A" and "C".

At the outset it should be made clear that this case involved a proposed change to the City Charter and is not an issue involving ". . . bonded indebtedness, tax referenda, or *constitutional* amendments" (em-

phasis added), the latter sanctioned by Article 10, Section 9(C) of the Constitution of Louisiana, 1974. Appendix "K". Further, please bear in mind that it was not the signing of the petition that was prohibited but the blatant political acts by two City classified civil servants in placing bumper stickers on City vehicles and circulating a petition to permit the Mayor to succeed himself that were reprobated.

The District Court in its opinion on Reconsideration was very clear on this point:

> "Broad restrictions upon the political activity of federal and state civil service employees have been upheld. *U.S. Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Broadrick* v. *Oklahoma* 413 U.S. 601, 93 S.Ct. 2908 37 L.Ed.2d 830 (1973). These cases require that the Court in First Amendment contexts, examine the 'closeness of fit" between the governmental interests in protecting the integrity of its civil service, and the prohibition sought to be applied; this means-end relationship must be determined on a case-by-case basis. Appendix "C", Page 13.

The District Court then cited *Morial* v. *Judiciary Commission of State of Louisiana,* 565 F.2d 295 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978) to this extent:

> "The standard to be applied in any case is a function of the impairment of first amendment interests. As the burden comes closer to impairing core first amendment values, e.g., the right to hold particular political views, . . . or impairs some given first amendment value more substantially . . . the requisite closeness of fit of means and end increases accordingly."

The District Court continued:

> "Applying this 'variable standard of scrutiny' to the case at hand produced no impairment of core First Amendment values. There is no Constitutional right on the part of a classified city employee to operate a city vehicle on which the "Dutch [Loves] New Orleans"/"New Orleans [Loves] Dutch" bumper stickers are displayed. And this is the only such act declared "not proper" by the Commission's directive.
>
> This is not an attempt to prohibit private expression, i.e. a bumper sticker on an employee's personal car. Without deciding the propriety of any such display, the Court nevertheless finds that there is no federal constitutional right for a public employee to display upon a public vehicle a legend or device which supports a political candidate.
>
> Nor can it be said that the Commission's prohibition against a classified city employee circulating the subject petition impairs core First Amendment values. It is clear that a classified employee may *sign* the petition, as the Commission directive clearly and specifically states, so long as the signature is not the product of coercion or intimidation. The prohibition against a classified employee circulating this kind of document bears a "close fit" to the ends sought to be achieved—including the elimination of any possible over-reaching by a superior upon a subordinate."

In citing *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978), the petitioners seem to want this Court to believe that this is a "non-candidate election". Actually, nothing

could be further from the truth as the trial judge readily discerned:

> "But the real issue is not whether this could be done, but whether the action taken in this particular instance is within the protection of the *Letter Carriers* decision in *Wachsman* v. *Dallas,* or as to whether it is political activity which is reprobated by the Constitution of Louisiana, or whether it is protected activity, either under the terms of the Constitution itself, or under the First Amendment as free speech."

Again, remember that what was at stake was not the signing of the petition that was being circulated by the plaintiffs to allow Mayor Morial to have unlimited terms via a Charter change but the circulating of the petition by classified employees *and* the attachment of obviously political bumper stickers to City vehicles being driven by classified employees.

Letter Carriers is squarely in point, all as was recognized by the District Court in its opinion, Appendix "A", P 13. Reading *Letter Carriers* and *Broadrick, supra,* together with *Wachsman* v. *City of Dallas,* 704 F.2d 160 (5th Cir. 1983), one has all of the law applicable to this case.

It is difficult to discern how the appellant can aver that the District Court's holding is contrary to *Letter Carriers.* When petitioners go further and state that the holding is also contrary to this Court's holdings in *First National Bank of Boston* v. *Bellotti, supra,* and also *Citizens' Against Rent Control* v. *Berkeley,* 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) it is on ground even less firm. A reading of both cases quickly indicates that they are not "Hatch-

Act" cases as are *Letter Carriers, Broadrick* and *Wachsman.* Both *Bellotti* and *Citizens* deal with completely different issues, and are so distinguishable on both facts and law that one wonders why they were cited in the first place.

Both cases are, in essence, suits challenging limits to spending by corporations or associations on questions to be submitted to voters. *Bellotti* involved several national banking associations and business corporations which wanted to spend money to publicize their views opposing a referendum proposal that was designed to amend the Massachusetts Constitution in order to authorize that Legislature to enact a graduated personal income tax. There was a criminal statute involved prohibiting the corporations from making any kind of contributions "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." This Court quite correctly struck *Bellotti* down as being unconstitutional. Neither were there any classified civil servants involved in the matter, nor "Hatch-Act" provisions prohibiting political activity on the part of the various people who were to undertake a campaign. On the contrary, the plaintiffs in that case were corporations and banking associations. The case mentions *Letter Carriers* only *en passant* for the proposition that "citizens confidence in government is equally important" as preserving the integrity of the electoral process, preventing corruption and sustain[ing] activity, alert responsibility of the individual in a democracy for the wise conduct of government. *"Supra,"* 788-89. Actually, *Bellotti* cites *Letter Carriers* in a favorable light for

a proposition already decided by this Court, one with which respondents have no quarrel and believe govern in the instant case. There is not even a hint in petitioners' brief explaining how *Bellotti* in any way alters or mitigates the effects of *Letter Carriers*. The case simply stands for the proposition that a state cannot prohibit a corporation any more than it could preclude individuals from making contributions for the expenditures advocating views on ballot measures.

With respect to *Citizens Against Rent Control* v. *Berkeley, supra,* also cited by petitioners to be in some way controlling of the issue herein all that can be said is that the issue on appeal in that matter involved a limitation of $250 on contributions to committees formed to support or oppose ballot measures which was held to violate the First Amendment. *Supra* 291. Again, this is not a political activities prohibition case in the sense of *Letter Carriers*. It simply is not analogous to the case at bar. The voters of Berkeley, California adopted an election referendum by initiative which placed limits on expenditures and contributions in campaigns involving both candidate and ballot measures. It is, true, a First Amendment-Freedom of the Speech case, but not one where the state has reprobated political activities by a classified civil servant. The right to do this was never challenged herein by petitioners and indeed that right was not only recognized but actually endorsed by this Court in *Letter Carriers, supra.*

CONCLUSION

This Court has long since decided all of the basic issues that are involved in the case at bar in *Letter*

Carriers, and *Broadrick,* and the Fifth Circuit has certainly made its pronouncement in *Wachsman.* The petitioners in brief seem to to overlook the prime ingredient of these cases when they aver that the District Court's Opinion holds contrary-wise to both *Bellotti, Citizens* and *Letter Carriers,* in that the prohibition against certain political activities by classified civil service employees has long since been sanctioned by this Court. It should also be remembered in this case that the petitioners never at any time challenged Louisiana's Constitutional provisions which prohibited Civil Service employees from participating in political activities. The Louisiana Constitution spells out the Prohibitions Against Political Activities as follows:

> "Section 9. (A) Party Membership; Elections. No member of a civil service commission and no officer or employee in the classified service shall participate or engage in political activity; be a candidate for nomination or election to public office except to seek election as the classified state employee serving on the State Civil Service Commission; or be a member of any national, state, or local committee of a political party or faction; make or solicit contributions for any political party, faction, or candidate; or take active part in the management of the affairs of a political party, faction, candidate, or any political campaign, except to exercise his right as a citizen to express his opinion privately, to serve as a commissioner or official watcher at the polls, and to cast his vote as he desires.
>
> (B) Contributions. No person shall solicit contributions for political purposes from any classified employee or official or use or attempt to use his position in the state or city service to punish

> or coerce the political action of a classified employee.
>
> (C) Political Activity Defined. As used in this part, political activity means an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election. The support of issues involving bonded indebtedness, tax referenda, or constitutional amendments shall not be prohibited." Article 10, Section 9, Louisiana Constitution 1974.

This provision and one similar to it has been upheld in *Bruno* v. *Garsaud,* 594 F.2d 1062 (5th Cir. 1979) and *Mortillaro* v. *State of Louisiana,* 356 F.Supp. 521 (1972).

The District Court found:

> "That the bumper sticker - petition effort amounted to a campaign; the one-two punch was a dual effort to (1) awaken public sentiment for Mayor Morial by widely displaying the bumper stickers while (2) seeking signatures on a petition in favor of an election to permit the Mayor to succeed himself. It would be less than realistic to expect that the effect of either (1) or (2), or both, would disappear upon the closing of the charter amendment referendum polls. Rather, should the election petitions succeed and the resulting vote be in favor of amending the charter, the residual effect of the Dutch-City reciprocal display of affection would doubtless carry over into the actual political campaign."

The District Court made a very serious analysis of the required "means-end" relationship that must be determined on a case-by-case basis and came away with the conclusion that "there can be no doubt that the petition was political in nature."

The final paragraph of the District Court's Opinion on the Motion for Rehearing is most fitting and will serve as a close for this presentation, to-wit:

> "The prohibition in the Commission's directive is fair and reasonable; the means it applies fits well to the end sought to be achieved—that is, to 'keep the employee from being involved in the politics that elects his boss'." *Wachsman, supra* at 165."

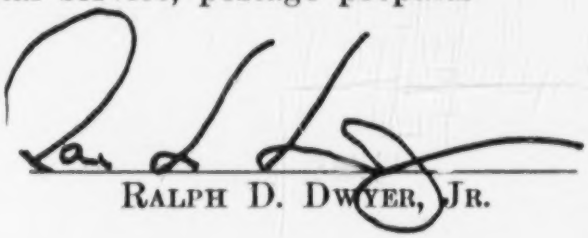
It is respectfully submitted that the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

RALPH D. DWYER, JR.
Attorney for Respondent
503 Whitney Bank Building
New Orleans, Louisiana 70130
(504) 524-2227

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Opposition to the Petition for Writ of Certiorari has been served upon Bruce C. Waltzer, 355 Decatur Street, New Orleans, Louisiana 70130 this day of November, 1984 by placing same in the United States postal service, postage prepaid.



RALPH D. DWYER, JR.